IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 19TH FEBRUARY 2007 / 30TH MAGHA 1928

RSA.No. 1175 of 2006()

AS.14/1999 of SUB COURT, KASARAGOD
OS.209/1991 of PRL.MUNSIFF, KASARAGOD

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APPELLANTS/LEGAL REPRESENTATIVES OF DECEASED 1ST APPELLANT & 2ND APPELLANT/LEGAL REPRESENTATIVES OF 1ST DEFENDANT & 2ND DEFENDANT:

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1. BHASKARAN, S/O.KUMARAN NAIR, RESIDING AT ARIYIL, KOLATHUR VILLAGE, JP.O.KOLATHUR, KASARAGOD TALUK, (VIA) CHENGALA, KASARAGOD DISTRICT.

2. BABY, D/O.KUMARAN NAIR, RESIDING AT ARIYIL, KOLATHUR VILLAGE, P.O.KOLATHUR, KASARAGOD TALUK, (VIA) CHENGALA, KASARAGOD DISTRICT.

3. VALSALA, D/O.KUMARAN NAIR, RESIDING AT ARIYIL, KOLATHUR VILLAGE, P.O.KOLATHUR, KASARAGOD TALUK, (VIA) CHENGALA, KASARAGOD DISTRICT.

4. RADHAKRISHNAN, S/O.KUMARAN NAIR, RESIDING AT ARIYIL, KOLATHUR VILLAGE, P.O.KOLATHUR, KASARAGOD TALUK, (VIA) CHENGALA, KASARAGOD DISTRICT.

5. CHANDRAN, S/O.KUMARAN NAIR, RESIDING AT ARIYIL, KOLATHUR VILLAGE, P.O.KOLATHUR, KASARAGOD TALUK, (VIA) CHENGALA, KASARAGOD DISTRICT.

6. A.M. MOHAMMADKUNHI, S/O.ANDUKKAI ALIAS ABDULKHADER, RESIDING AT ARIYIL, KOLATHUR VILLAGE, P.O.KOLATHUR, KASARAGOD TALUK, (VIA) CHENGALA, KASARAGOD DISTRICT.

BY ADV. SRI.D.KRISHNA PRASAD
SRI.D.NARENDRANATH
SRI.M.HARISHARMA
SRI.T.P.ELDHOSE
SMT.O.K.SANTHA

RESPONDENTS/RESPONDENT & 3RD APPELLANT/PLAINTIFF & 3RD DEFENDANT

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1. K. ABOOBACKER, S/O.HASSINAR,
RESIDING AT ARIYIL, KOLATHUR VILLAGE,
P.O.KOLATHUR, KASARAGOD TALUK,
(VIA) CHENGALA, KASARAGOD DISTRICT.

2. MOHAMMAD HANEEFA, S/O.MAKKAKADAN KOMAN,
RESIDING AT ARIYIL, KOLATHUR VILLAGE,
PL.O.KOLATHUR, KASARAGOD TALUK,
(VIA) CHENGALA, KASARAGOD DISTRICT.

BY //

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 19/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO. 2813/07 IN RSA 1175/06

DISMISSED

19/2/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

R.S.A .NO. 1175 OF 2006

Dated 19th February 2007

J U D G M E N T

Appellants are defendants in O.S.209/1991 on the file of Munsiff court, Kasargod. First respondent is the plaintiff and second respondent second defendant. First respondent filed suit seeking recovery of possession of plaint schedule properties from the appellants. According to appellants plaint A schedule property having an extent of 4.40 acres was obtained by plaintiff by oral kuzhikanam marupattom from Kodoth Kunhambu Nair, original landlord and later under Ext.A1 sale deed dated 21/5/1965 he purchased the jenmom right also and in Taluk Land Board proceedings No.763/73 his right over the property covered under Ext.A1 sale deed was upheld and appellants have no manner of right or title to the properties trespassed upon by him and therefore respondent is entitled to the decree for recovery of possession sought for.

2. Appellants in their written statement

disputed the title and contended that they are not parties to the Taluk Land Board proceedings and that proceedings is not binding on them and respondent has only title over 1.65 acres in R.S.No.23/1 of Kolathur village which consists of vast extent of land. It was contended that in 1990 when respondent began to claim right over the properties in the possession of appellants on the strength of Ext.A1 sale deed, dispute arose and Ext.B6 settlement was arrived at in the intervention of mediators whereunder respondent agreed that he will pay a consideration at the rate of Rs.3,000/- per acre and appellants will convey the respective portions in their possession to respondent therefore respondent is not entitled to a decree for recovery of possession. It was also contended that appellants have perfected their title by adverse possession in respect of properties described in schedules X, Y and Z in the written statement and at any rate, respondent is estopped from claiming recovery of possession from appellants in view of Ext.B6 agreement.

3. Learned Munsiff on the evidence of PW1 on the side of respondent and defendants 2 and 1 as Dws.1 and 4 and two witnesses as Dws.2 and 3 and Exts.A1 to A6

and Exts.B1 to B6 and Exts.C1 and C2, found that respondent has title to plaint schedule property under Ext.A1. It was further found that though respondent claimed title to 4.40 acres under Ext.A1 sale deed, property available is only 3.27 acres as reported by the Commissioner under Ext.C1 and demarcated in Ext.C2 plan. It was also found that under Ext.B6 settlement will not prohibit respondent from getting a decree for recovery of possession based on the strength of title and granted a decree in his favour. Appellants challenged decree and judgment before Sub court, Kasargod in A.S.14/1999. Learned Sub Judge on re-appreciation of evidence confirmed the decree and dismissed the appeal which is challenged in this second appeal.

4. Learned counsel appearing for appellants was heard.

5. Learned counsel appearing for appellants relying on the decisions of Apex court in **Commissioner of Income Tax, Bombay v. Royal Western India Turf Club Ltd. (AIR 1954 SC 85), Commissioner of Income Tax, Madras v. Indian Bank Ltd. (AIR 1965 SC 1473)** and Division Bench decision of High Court of Assam in

Tinsukia Municipal Board & another v. Harikissen Lohia and others (AIR 1957 Assam 10) argued that Ext.B6 settlement operates against respondent from claiming recovery of possession as under Ext.B6 he has agreed to pay consideration of Rs.3,000/- per acre to appellants and therefore courts below should have found that respondent was estopped from claiming the decree. Learned counsel argued that Ext.B6 establish that appellants are in possession of the property and though they perfected their title by adverse possession by the agreement they agreed to sell the property in favour of respondent for the consideration stipulated therein and by agreeing for the said settlement, appellants have given a go by to the claim for title perfected by adverse possession and therefore respondent cannot be permitted to seek decree for recovery of possession as it is barred by principles of estoppel as provided under Section 115 of Evidence Act. It was argued that courts below did not properly appreciate the case and the decree and judgment warrants interference. It was also argued that though under Ext.A1 respondent obtained 4.40 acres, Ext.C1 report and Ext.C2 plan show the extent is only less

and courts below should have been found that plaint schedule property has not been identified and therefore the decree is unsustainable.

6. On hearing learned counsel and going through the judgments of courts below, I do not find any substantial question of law is involved in the appeal. Under Ext.A1 respondent purchased the property from its previous owner Kunhambu Nair. In Taluk Land Board proceedings Ext.A1 was produced. The right of respondent was upheld in the proceedings. Title of Kunhambu Nair to the properties was not disputed. Even if the oral lease alleged was not proved, under Ext.A1 the title of Kunhambu Nair was assigned to respondent. Hence respondent has title to the property covered by Ext.A1. Though under Ext.A1 4.40 acres have been assigned in favour of respondent, courts below on the evidence found that total extent available is only 3.27 acres. Respondent was found to be in possession of only 1.65 acres and appellants are in possession of balance extent. Having established the title respondent is entitled to get recovery of possession of the property in the possession of appellants, unless that title is not barred or appellants are protected by any other law or principles of estoppel as pleaded by

them.

7. Though appellants contended that title of respondent was barred by adverse possession and limitation, courts below on the evidence found that there is no evidence to prove that appellants have perfected their title by adverse possession. When suit is for recovery of possession based on strength of title, respondent need not prove that he has been in possession of the property within 12 years from the date of filing of suit. Instead burden is on appellants to prove that they have been in possession of the plaint schedule properties for more than 12 years before institution of suit and that too adverse to the true owner. Courts below following the law as laid down in **A.B.Patil v. B.B.Patil (AIR 1995 SC 895)** rightly found that it is for appellants to prove that their possession was hostile to the true owner and appellants failed to prove the same. Courts below on the evidence found that there is no evidence to prove that appellants have perfected the title. More over, Ext.B6 agreement produced by appellants establish that title of respondent to the properties was admitted by appellants. In such circumstances, appellants are not entitled to contend that they have perfected their by

adverse possession or the title of respondent was barred by adverse possession.

8. It was argued that in view of Ext.B6 agreement, respondent was estopped from claiming recovery of possession. Question is whether it is so. Ext.B6 agreement shows that it was the result of settlement arrived at by mediators. It recites that when 4.40 acres belonging to respondent was measured, it was found that appellants are respectively in possession of 54 cents, 37 cents and 64 cents and 6.08 cents. It was further recited that appellants would execute a sale deed in favour of respondent for consideration of Rs.3,000/- per acre. It also shows that document is to be executed before 26/12/1990. Question is whether this would operates as estoppel against claim of respondent for recovery of possession on the strength of title. If respondent is not paying the amount as shown in the agreement, agreement does not provide for any remedy to appellants. True, it shows that respondent had agreed to pay value at the rate of Rs.3,000/- per acre to appellants. Question is whether by this agreement respondent is barred from claiming recovery of possession on the strength of his title. There is nothing in Ext.B6 agreement to

establish that because of the agreement respondent is not entitled to seek recovery of possession on the strength of his title. Ext.B6 will not convey the title of plaint schedule properties to appellants. It is not clear from Ext.B6 as to what is the right to be purchased from appellants by respondent. Appellants have no title except the factum of right of possession. Ext.B6 agreement will not prohibit respondent from seeking decree for recovery of possession on the strength of his title. As it was found that respondent has got title and that title is not barred by adverse possession and appellants have no better title, respondent is entitled to the decree granted by court below. I find no substantial question of law is involved in this appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.